

United States
Circuit Court of Appeals

For the Ninth Circuit. 9

STAR POINTER EXPLORATION COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA, GREAT
NORTHERN RAILWAY COMPANY, a Cor-
poration, and RAYMOND MacDONALD, As
Trustee of an Express Trust for Others,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana.

FILED

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No. 9274

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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MR. J. E. CORETTE, JR.,

Butte, Montana,

MR. L. V. KETTER,

Butte, Montana.

Attorneys for R. J. MacDonald, as Trustee
of an Express Trust for Others, Inter-
vener, and Appellee.

MR. S. P. WILSON,

Deer Lodge, Montana,

MR. EDWARD J. BLOOM,

Wallace, Idaho,

Attorneys for Star Pointer Exploration
Co., Appellant. [1*]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States in and
for the District of Montana.

No. 32 Civil

UNITED STATES OF AMERICA,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Defendant.

Be it remembered, that on March 23, 1939, the
Plaintiff filed its complaint herein, which is in the
words and figures following, to-wit: [2]

District Court of the United States for the District
of Montana, Great Falls Division.

No. 32

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
corporation,

Defendant.

COMPLAINT

Now comes the above-named plaintiff, the United
States of America, and files this its complaint by
its undersigned solicitor, the duly appointed, quali-
fied and acting United States Attorney in and for

the District of Montana. This suit is brought, filed and prosecuted by the special direction of the Attorney General of the United States and at the request of the Secretary of the Interior of the United States and in its own behalf, and for cause of action alleges:

I

That the defendant is a railway corporation, organized under the laws of the State of Minnesota for the purpose of operating and maintaining a railway and businesses incident thereto, and that the said Great Northern Railway Company has been at all times herein involved operating and maintaining a railway, engaged in part in the transportation of goods in interstate commerce.

II

That jurisdiction is vested in this Court under Revised Statutes, Sections 563 and 629, and amendments thereto, now being Section 41, Title 28, United States Code. [3]

III

That under the Act of March 3, 1875 (18 Stat. 482), the St. Paul, Minneapolis and Manitoba Railway Company, a railroad corporation, was granted a right of way through the public lands of the United States. That on the eleventh day of October, 1907, the St. Paul, Minneapolis and Manitoba Railway Company conveyed to the Great Northern Railway all its rights of property, in-

cluding "various lands granted to it by the United States of America and by the State of Minnesota to aid in the construction of a railroad, hereinbefore described," etc. That the said Great Northern Railway Company is now operating and maintaining a railroad on the right of way over public lands granted to the St. Paul, Minneapolis and Manitoba Railway Company under the Act of March 3, 1875.

IV

That a portion of said right of way, so granted and now in use by the Great Northern Railway Company in operating and maintaining a railroad, crosses Sections 7, 16, 17 and 18 in Township 33 North, Range 5 West, and Sections 1, 2 and 12 in Township 33 North, Range 6 West, all in Glacier County, State of Montana.

V

That under the Act of March 3, 1875, the St. Paul, Minneapolis and Manitoba Railway Company or its successor, the Great Northern Railway Company, acquired neither the right to use any portion of said right of way for the purpose of drilling for and removing subsurface oil and minerals, nor any right, title or interest in or to the oil or mineral deposits underlying the said right of way, but that such oil and minerals remained the property of the United States, and subject to its control and disposition. [4]

VI

That the defendant, the Great Northern Railway Company, claims and asserts ownership to the oils and minerals underlying its right of way as aforesaid and the right to take and remove the same and is about to and has threatened to use portions of the right of way, crossing the lands hereinbefore described, for the purpose of drilling for and removing subsurface oil.

VII

That unless the said Great Northern Railway Company, the defendant, be restrained and enjoined from drilling for and removing oil underlying the surface of the right of way hereinbefore described the United States will be deprived of its property and the right thereto and will suffer irreparable injury.

VIII

That any operation or proceeding for, or the taking of any oil, gas, or minerals from the subsurface of the right of way hereinbefore described constitutes a violation of the terms and provisions of the said Act of March 3, 1875.

IX

That no lease has been issued to the defendant, the Great Northern Railway Company under the Act of May 21, 1930 (46 Stat. 373), to drill upon or remove deposits of oil and gas under the said right of way of the defendant, nor has any application therefor been made.

Wherefore, the plaintiff prays that a permanent injunction be issued restraining and enjoining the Great Northern Railway Company from in any manner using the right of way granted, as hereinbefore described, for the purpose of drilling for and removing oil, gas and minerals underlying its right of way except under a lease issued pursuant to the provisions of the said Act of May 21, 1930, and that a permanent injunction issued, restraining the defendant, the Great Northern Railway Company, from drilling for or removing any oil, gas or minerals beneath the surface of its right of way, crossing the lands hereinbefore [5] described, or any other lands granted under the Act of March 3, 1875, and now owned or used by the said defendant except under a lease issued pursuant to the provisions of the said Act of May 21, 1930.

JOHN B. TANSIL,

United States Attorney.

United States of America,
District of Montana—ss.

John B. Tansil, being first duly sworn, on oath deposes and says:

That he is the duly appointed, qualified and acting Attorney of the United States, in and for the District of Montana, and as such, makes this verification to the foregoing Complaint; that he has read the said Complaint and knows the contents

thereof, and that the same is true to the best of his knowledge, information and belief.

JOHN B. TANSIL.

Subscribed and sworn to before me this 21st day of March, 1939.

[Seal] ROY F. ALLAN,

Notary Public in and for the District of Montana,
residing at Billings, Montana.

My Commission expires June 29, 1941.

[Endorsed]: Filed March 23, 1939. [6]

Thereafter, on April 18, 1939, Answer of Great Northern Railway Company, Defendant, was duly filed herein in the words and figures following, to-wit: [7]

[Title of District Court and Cause.]

ANSWER

Now comes the defendant above named and answers the complaint of the plaintiff herein as follows:

I

Defendant admits the allegations in paragraphs I, II, III, IV, VI, and IX of said complaint.

II

Defendant denies paragraph V. of said complaint and each and every allegation therein contained.

III

Answering paragraph VII of said complaint, defendant admits that unless it is restrained therefrom, it will proceed to drill for and remove the oil underlying the surface of the right of way described in said complaint, but denies that said oil, or any part thereof, is the property of the United States, and denies that the United States will be deprived of any property or that it will suffer any irreparable or other injury as a result of defendant's intended action.

IV

Defendant denies paragraph VIII of said complaint, and each and every allegation therein contained.

V.

Further answering said complaint, and as an affirmative defense thereto, defendant alleges that there is oil underlying said right of way of a character and quantity suitable for use as fuel upon defendant's locomotives operated upon its interstate railroad which passes over said right of way, and that it is economically practicable and [8] desirable for defendant to remove said oil and use the same upon its said locomotives, and that defendant will suffer severe loss if restrained or enjoined from so doing.

VI.

Defendant further alleges that said oil has a commercial value substantially in excess of the cost of producing the same, and that if defendant is permitted to remove said oil, it can sell the same commercially for large amounts of money which would be of great value and assistance to defendant in the operation of its railroad.

VII.

Defendant further alleges that the said oil contains volatile portions which can be removed by refinement and used for gasoline and other similar products, leaving a residue which is suitable for locomotive fuel, and that the greatest net proceeds and best economic results can be obtained from said oil by refining the same and by disposing of the more volatile portions commercially and using the residue as fuel oil.

Unless restrained by this Court, defendant intends to and will drill three separate wells upon said right of way, the oil produced from well number one will be sold commercially and the proceeds used in the operation of defendant's railroad. The oil produced from well number two will be refined, the more volatile portions being sold commercially and the residue being used as fuel oil upon defendant's locomotives. The oil produced from well number three will be used in its entirety as fuel oil upon defendant's locomotives.

Wherefore, defendant prays that the complaint herein be dismissed.

T. B. WEIR,
Attorney for Defendant,
Helena, Montana.

F. G. DORETY,
St. Paul, Minnesota,
WEIR, CLIFT & BENNETT,
Helena, Montana,
Of Counsel. [9]

State of Montana,
County of Lewis and Clark—ss.

John J. Mitchke, being first duly sworn, deposes and says:

That he is a citizen and resident of the State of Montana, over twenty-one (21) years of age; that on the 17th day of April, 1939, affiant deposited in the United States Post Office at Helena, Montana, a true copy of the foregoing Answer in a sealed envelope with first class postage fully prepaid, and addressed to John B. Tansil, Billings, Montana; that said John B. Tansil is attorney for plaintiff and has his office at and resides in said Billings, Montana.

That T. B. Weir is attorney for defendant in said cause and has his office in and resides at Helena, Montana, and that there is a regular communication by mail between said City of Helena, Montana,

and said City of Billings, Montana; and that affiant is in no way interested in said cause.

JOHN J. MITCHKE.

Subscribed and sworn to before me this 17th day of April, 1939.

[Seal] W. L. CLIFT,

Notary Public for the State of Montana, residing at Helena, Montana.

My commission expires Dec. 2, 1939.

[Endorsed]: Filed April 18, 1939. [10]

—————

Thereafter, on June 19th, 1939, Notice of Motion For Leave to Intervene by Star Pointer Exploration Company, was duly filed herein, in the words and figures following, to-wit: [11]

District Court of the United States for the District
of Montana, Great Falls Division.

No. 32 Civil

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a corporation,

Defendant,

STAR POINTER EXPLORATION COMPANY,
Intervenor.

NOTICE OF MOTION FOR LEAVE TO
INTERVENE

To the United States of America, Plaintiff, and
Great Northern Railway Company, Defendant, and
all persons interested in the above-entitled cause:

You, and each of you, will please take notice that
on Wednesday, June 21, 1939, at 10:00 A.M., in the
Courtroom of the District Court [12] of the United
States, in the Federal Building at Billings, Mon-
tana, the undersigned Star Pointer Exploration
Company, through its undersigned Solicitors, will
move the said District Court for leave to file a
Petition in Intervention, Pro Interesse Suo, in the
above-entitled cause.

Copy of said Petition for Leave to Intervene and Petition in Intervention is served upon you herewith.

S. F. WILSON

EDWARD J. BLOOM

Solicitors for Intervenor.

[Endorsed]: Filed June 19, 1939. [13]

Thereafter, on June 19th, 1939, Motion and Petition for Leave to Intervene by Star Pointer Exploration Company, was duly filed herein, in the words and figures following, to-wit: [14]

[Title of District Court and Cause.]

MOTION AND PETITION FOR LEAVE TO
INTERVENE

Now comes Star Pointer Exploration Company, a corporation of the State of Nevada, hereinafter sometimes referred to as the Petitioner and Applicant for Intervention, and petitions this Honorable Court for [15] leave to intervene Pro Interesse Suo in the above-entitled action upon the following grounds:

I

That jurisdiction is vested in this Court under Revised Statutes, Sections 563 and 629, and amend-

ments thereto, now being Section 41, Title 28, United States Code, and Sections 723-b and 723-c, Title 28, United States Code.

II

In its complaint herein the United States of America, Plaintiff, alleges that under the Act of March 3, 1875, granting a right-of-way through the public lands of the United States to the predecessor of the Great Northern Railway Company, that said Company acquired neither the right to use any portion of said right-of-way for the purpose of drilling for and removing sub-surface oil and minerals, nor any right, title or interest in or to the mineral deposits underlying the said right-of-way, but that such minerals remained the property of the United States and subject to its control, and disposition, and that the defendant Railway Company claims and asserts ownership to the oils and minerals underlying its right-of-way and, unless restrained, will drill for and remove minerals underlying the surface of the [16] right-of-way described, depriving the United States of its property and the right thereto to its irreparable injury. And, further, that the United States has the right to dispose of the mineral oil underlying said right-of-way under the Act of May 21, 1930 (46 Stat. 373). The defendant Railway Company admits that unless it is restrained, it will drill for and remove the mineral oil underlying the surface of its right-of-way and

denies that any part thereof is the property of the United States, but is its own property.

III

Petitioner's claim hereinafter stated is adverse to Plaintiff and adverse to Defendant as to the minerals only, but relates to the subject thereof, to-wit: The title to minerals underlying a railroad right-of-way granted under the Act of Congress of March 3, 1875.

IV

Petitioner is the owner in fee of certain sections of land in Granite County, Montana, by virtue of a series of patents from the United States to its predecessors in interest. All such sections are traversed by and are subject to the right-of-way of the Northern Pacific Railway Company. Said right-of-way was granted through the public lands [17] of the United States by Plaintiff to Northern Pacific Railway Company, under the Acts of July 2, 1864, and March 3, 1875, and Acts supplementary thereto and amendatory thereof. Plaintiff's patents to Intervenor reserved neither the right-of-way by it previously granted to the Railroad Company nor the minerals underlying the said right-of-way, nor any minerals whatsoever, and as to minerals in lands so patented, your Petitioner alleges that neither the Plaintiff nor the Defendant have any right, but that said rights belong entirely to the Patentee and its successors in interest.

V

The Plaintiff and Defendant each claim title to the minerals underlying the right-of-way so granted by the Act of March 3, 1875. Intervenor avers that neither Plaintiff nor Defendant is or can be the owner of such underlying minerals because such minerals are owned by the Patentees and Grantees from the Plaintiff of fractional subdivisions of land traversed by the railroad rights-of-way, such ownership being subject, nevertheless, to the rights of the Railroad Company in the right-of-way strip as the same are conferred, and for the purposes granted, under the Acts of Congress mentioned in the complaint. [18]

VI

In principle and in fact, title to minerals estimated to exceed in value the sum of Four Million Dollars (\$4,000,000) and belonging to Petitioner and underlying the right-of-way of the Northern Pacific Railway Company will be determined by the judicial construction by this Court of the Act of March 3, 1875, the same being the subject matter of consideration by this Court in the above-entitled action.

VII

New rules of civil procedure in this Court contained in Section 723-c, of Title 28, United States Code, provide, so far as pertinent to this petition, as follows:

Rule 24. Intervention.

(A) Intervention of right. Upon timely application, anyone shall be permitted to intervene in an action. * * * (2) when the representation of the applicant's interest by existing parties is or may be inadequate, and the applicant is or may be bound by a judgment in the action. * * *

(B) Permissive intervention. Upon timely application anyone may be permitted to intervene. * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion, the Court shall [19] consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

VIII

Petitioner, the successor in interest of such Patentees and Grantees of the Plaintiff, avers that any attempted representation of its interest by Plaintiff is and will be inadequate and that in fact Plaintiff's interest is adverse to Petitioner and no representation of its interest will be made by Plaintiff, nor will Plaintiff present Petitioner's claim or legal rights to the consideration of the Court, either in whole or in part or at all, and that Petitioner is or may be bound by a judgment in the above-entitled cause to its irreparable injury. Upon all the matters and things stated herein Petitioner is entitled to intervene under new Equity Rule 24-A-2 and, further, Petitioner may be, and Petitioner re-

spectfully urges that it be, permitted to intervene (if not as a matter of right under Equity Rule 24-A-2, then) under that provision of new Equity Rule 24-B-2 quoted above which provides that intervention may be granted when applicant's claim and the main action have a question of law in common.

IX

Petitioner alleges that the [20] question of law is whether, under the Railroad Land Grant Right-of-Way Act of March 3, 1875, and Acts supplementary thereto and amendatory thereof, title to the minerals underlying rights-of-way so granted are vested in:

1. The United States, Plaintiff herein, or
2. The Railway Company, Defendant herein, or
3. The Patentee of the subdivision traversed by the right-of-way.

Petitioner and Applicant for Intervention contends that the question ought not to be determined by a consideration only of the asserted rights of Plaintiff and Defendant, that is, whether the title is vested in the United States or the Railway Company, but should be extended to that class of property owners in the situation of Petitioner, and Petitioner believes that such rights will not be stressed by either of the parties of the action; and that a full and complete judicial and equitable disposition of the pending case cannot be made without consid-

eration by this Court of the rights of that class of ownership represented by Petitioner and Applicant for Intervention.

X

Petitioner avers that the title of the United States to the minerals underlying the right-of-way, if not extinguished by the Act of March 3, 1875, was extinguished by the subsequent Act of the United States in [21] patenting the land traversed by the right-of-way to the Petitioner's predecessors in interest and that the present right of possession to said minerals in Petitioner is superior to the rights asserted in the main suit by either Plaintiff or Defendant.

XI

Petitioner avers that denial of intervention herein would constitute denial of relief to which this Petitioner is entitled in that not being fairly represented either by the Plaintiff or Defendant herein, its rights might be lost or substantially affected if intervention is not allowed by this Honorable Court.

XII

Petitioner avers that its interest in the litigation is substantial and that its attempted intervention is made in good faith and in subordination to and in recognition of the main proceeding and expressly recognizes the jurisdiction of this Court therein, and alleges further that no remedy other than the intervention proposed herein is available for pro-

tection of Intervenor's rights to minerals underlying said railway right-of-way for the reason that the Plaintiff claims said minerals and your Petitioner is without statutory authority to litigate or quiet its title against Plaintiff in an independent suit brought for that purpose. [22]

XIII

Petitioner avers that intervention will not unduly delay or prejudice the adjudication of the rights of the original parties hereto.

XIV

Petitioner avers that, in the interest of justice and equity and to secure a complete adjudication of the title to minerals underlying its grant under the Act of March 3, 1875, Defendant, the Great Northern Railway Company, interposes no objection to the granting by this Court of Petitioner's Intervention.

Wherefore, Petitioner prays this Honorable Court that its Petition for Leave to Intervene Pro Interesse Suo be granted and its Petition in Intervention be ordered filed in the above-entitled cause and that all the allegations thereof be deemed denied by both Plaintiff and Defendant herein.

Respectfully submitted,

S. P. WILSON,

EDWARD J. BLOOM,

Attorneys for Petitioner.

Duly verified.

S. P. WILSON,
Deer Lodge, Montana,
EDWARD J. BLOOM,
Wallace and San Francisco,
Attorneys for Star Pointer
Exploration Company, Drum-
mond, Montana, Petitioner,
Applicant and Intervenor.

[Verified] [23]

Due and timely service of the within petition for leave to intervene and Intervention Pro Interesse Suo is hereby admitted this 22nd day of June, 1939.

JOHN B. TANSIL,
Solicitor for Plaintiff.
F. G. DORETY,
Solicitor for Defendant.

[Endorsed]: Filed June 19th, 1939. [24]

Thereafter Counsel for Star Pointer Exploration Company delivered to the Clerk of this Court a paper endorsed Intervention Pro Interesse Suo, which is in the words and figures following, to-wit:

[25]

[Title of District Court and Cause.]

INTERVENTION PRO INTERESSE SUO

Now comes the above-named Intervenor, Star Pointer Exploration Company, a corporation of the State of Nevada, and files this, its Intervention Pro Interesse Suo, by its undersigned solicitors in its own behalf and for cause of action alleges: [26]

I

That Intervenor is a mining corporation organized under the laws of the State of Nevada and duly qualified and authorized to do business in the State of Montana.

II

That jurisdiction is vested in this Court in the main case under Revised Statutes, Sections 563 and 629, and amendments thereto, now being Section 41, Title 28, United States Code, and herein under Sections 723-B and 723-C, of Title 28, United States Code.

III

That under the Acts of July 2, 1864, and March 3, 1875 (18 Stat. 482) and Acts supplementary thereto and amendatory thereof, the Northern Pacific Railroad Company, now the Northern Pacific Railway Company, was granted a right-of-way through the public lands of the United States, and said Northern Pacific Railway Company is now operating and maintaining a railroad on the right-of-way over the public lands so granted to the

Northern Pacific Railroad Company under the Acts of Congress aforesaid.

IV

That a portion of said right-of-way so granted and now in use by the Northern Pacific Railway Company in operating and [27] maintaining a railroad crosses Sections 14, 15, 16, 17, 19, 20, 21, and 22, T11N, R14W, and Sections 15, 23, and 24, T11N, R15W, N.P.N., all in Granite County, State of Montana, within the Judicial District of this Court.

V

Intervenor is the owner in fee of said Sections of land so traversed by and subject to the right-of-way of the Northern Pacific Railway Company, except as to portions of Sections 14, and Sections 15 and 22, T11N, R14W, wherein it is the owner of a leasehold in the minerals. That said Sections comprise the Hellgate Valley and the area underlying said right-of-way and coterminous with said right-of-way, contains placer gold in commercial quantities, recoverable by dredge mining methods. That under the Acts of July 2, 1864, and March 3, 1875, the Railroad Companies acquired a fee in the surface of the right-of-way and so much beneath as may be necessary for support and the right to use and possession for railroad purposes, and the right to use the right-of-way for any additional purpose so long as the use as a railroad is not interfered with or abandoned, but acquired no right, title or interest [28] in or to the mineral deposits underlying the

said right-of-way, but such minerals remained the property of the United States and subject to its control and disposition and said United States did subsequently dispose of said minerals by patent to the predecessors in interest of the Intervenor, reserving neither the right-of-way nor the minerals underlying the said right-of-way nor any minerals whatsoever.

VI

That the Plaintiff, the United States of America, claims and asserts ownership to the minerals underlying the rights-of-way granted and patented as aforesaid and claims and asserts the right to enter upon said right-of-way and dispose of a portion of said minerals through its agents or lessees under the Act of March 21, 1930. (46 Stat. 673)

VII

That the Defendant, the Great Northern Railway Company, claims and asserts ownership to the minerals underlying its right-of-way as aforesaid and the right to take and remove the same and is about to and has threatened to use portions of its right-of-way crossing the lands described in the Complaint for the purpose of drilling for and removing the [29] mineral substance lying beneath the surface of said right-of-way (oil).

VIII

That any operation or proceeding for the taking of minerals from the sub-surface of a right-of-way so granted by either the Plaintiff or Defendant

constitutes a violation of the terms and provisions of the said Act of March 3, 1875, and that thereby the Intervenor will be deprived of its property.

IX

That any claim of title to the mineral deposits underlying the said right-of-way by Plaintiff constitutes a cloud upon the patent and a claim adverse to the rights granted by Plaintiff both to Intervenor and to Defendant.

X

That title of the United States to the minerals underlying the right-of-way was extinguished, if not by the Act of March 3, 1875, by the subsequent Act of the United States in issuing patent to Intervenor's predecessors in interest, and thereby the possibility of reverter to the United States existing by reason of the limitations and reservations contained in the grant made by the Act of March 3, 1875, has been forever extinguished. [30]

Intervenor's present right of possession to the minerals underlying said rights-of-way is superior to the rights asserted in the main suit and superior to the claim of either Plaintiff or Defendant therein.

Wherefore, Intervenor prays that the prayer of Defendant in the main suit be granted and that the Complaint herein be dismissed.

S. P. WILSON

EDWARD J. BLOOM

Solicitors for Intervenor.

[Duly verified.] [31]

Thereafter, on June 22, 1939, the Court denied the Motion and Petition of the Star Pointer Exploration Company for Leave to Intervene, the Minute Entry of the record of hearing said Motion and Petition and the Order denying the same being as follows, to-wit:

[ORDER DENYING MOTION AND PETITION
OF STAR POINTER EXPLORATION
COMPANY FOR LEAVE TO INTER-
VENE.] [32]

In the District Court of the United States in and
for the District of Montana.

No. 32

UNITED STATES

vs.

GREAT NORTHERN RAILWAY COMPANY.

This cause was duly called for hearing this day on the plaintiff's Motion for Judgment, and on the Motion of the Star Pointer Exploration Company for leave to intervene herein, Mr. John B. Tansil, the District Attorney, and Mr. Aubrey Lawrence, Special Assistant to the Attorney General, of Washington, D. C., appearing for the United States, Mr. F. G. Dorety, of St. Paul, Minn., appearing for the defendant, and Mr. S. P. Wilson of Deer Lodge, Montana, and Mr. Edward J. Bloom of Wallace, Idaho, appearing for said Star Pointer Exploration Company.

Thereupon, on motion of the District Attorney, court ordered that Mr. Aubrey Lawrence, Special Assistant to the Attorney General, of Washington, D. C., be admitted to practice for the purposes of this case, and that his name be entered as associate counsel for the United States.

Thereupon Mr. J. E. Corette, Jr., and Mr. L. V. Ketter, as counsel, filed and presented a notice of motion and a motion of R. J. McDonald, as trustee, for leave to intervene herein, with a complaint in intervention and an answer to plaintiff's complaint, annexed to said notice and motion, to which counsel for the United States then and there objected.

Thereupon counsel for the United States filed a written Answer and Objection to the petition of the Star Pointer Exploration Company for leave to intervene herein.

Thereupon, on motion of Mr. Corette, court ordered that the record show that the notice of motion for leave to intervene and the motion and petition of R. J. MacDonald, as Trustee, for leave to intervene, with complaint in intervention and answer attached thereto, were served on the attorneys for the United States and on the attorneys for the defendant Great Northern Railway Company before court opened this day and that the plaintiff and the defendant herein waive any further notice.

Thereupon the motion of the Star Pointer Exploration Company to intervene, and the motion of R. J. MacDonald, as Trustee, for leave to intervene,

were duly heard, argued and submitted, and by the court taken [33] under advisement until 2:00 P. M. this day.

Thereafter, at 2:00 P. M., and after due consideration, court ordered that the said petition of the Star Pointer Exploration Company for leave to intervene herein be and is denied, to which ruling of the court counsel for said Star Pointer Exploration Company then and there excepted and exception was duly noted. Thereupon on motion of counsel for said Star Pointer Exploration Company, said company was granted thirty days within which to file notice of appeal herein.

Thereupon, after due consideration, court ordered that the motion of R. J. MacDonald, as Trustee, for leave to intervene herein, be allowed tentatively and counsel were directed to file briefs thereon.

Thereupon Mr. Lawrence stated that as counsel for the United States he desired to appear specially at this time and object to the jurisdiction of the court to hear and determine the issues presented by the intervenor R. J. MacDonald, as Trustee, upon the ground that they constitute a cross bill or cause of action against the United States, to which the United States has not consented, which objection was by the court tentatively overruled. Thereupon Mr. Lawrence stated that the United States will desire to file an answer to the complaint in intervention of said R. J. MacDonald, as Trustee, and a reply to the answer of said intervenor, which

the court ordered be considered as filed at this time.

Thereupon Mr. Dorety stated that the defendant Great Northern Railway Company will desire to file an answer to the complaint in intervention of said R. J. MacDonald, as Trustee, and court ordered that said answer be considered as filed at this time.

Thereupon Mr. Corette, as counsel for R. J. MacDonald, as Trustee, moved the Court for judgment on the pleadings, with the understanding that a written motion therefor would later be filed herein this day.

Thereupon the motion of the United States for Judgment on the Pleadings and the motion of R. J. MacDonald, as Trustee, for Judgment on the Pleadings, were duly heard, argued and submitted and by the court taken under advisement.

Thereupon briefs were filed by the plaintiff and the defendant; the intervenor, R. J. MacDonald, as Trustee, was granted twenty days [34] from this date within which to file his brief and counsel for the plaintiff and defendant were granted thirty days thereafter in which to file their reply briefs.

Entered in open Court at Billings, Montana, June 22, 1939.

C. R. GARLOW,

Clerk. [35]

Thereafter, on June 22, 1939, Notice of Motion For Leave to Intervene, Motion and Petition for

Leave to Intervene, Complaint in Intervention and Answer to Plaintiff's Complaint, by Raymond J. MacDonald, as Trustee of an express trust for others, was duly filed herein, in the words and figures following to-wit: [36]

In the District Court of the United States for the
District of Montana, Great Falls Division.

No. 32 Civil

UNITED STATES OF AMERICA,

Plaintiff,

v.

GREAT NORTHERN RAILWAY COMPANY,
a corporation,

Defendant,

RAYMOND J. MacDONALD, As Trustee of an
Express Trust for Others,

Intervenor.

NOTICE OF MOTION FOR LEAVE TO
INTERVENE

To: The United States of America, Plaintiff, and
Great Northern Railway Company, Defendant,
and all persons interested in the above entitled
cause.

You, and each of you, will please take notice that
on Thursday, June 22nd, 1939, at 10:00 o'clock A.
M., in the Court Room of the above entitled Court in
the Federal Building at Billings, Montana, the un-

dersigned, Raymond J. MacDonald, as Trustee of an express trust for others, through his undersigned solicitors, will move the above entitled Court for leave to file a Petition in Intervention in the above entitled cause.

A copy of said Petition for Leave to Intervene and of the proposed Complaint in Intervention of Raymond J. MacDonald, as such Trustee, is served upon you, herewith.

W. H. HOOVER

J. E. CORETTE, JR.

L. V. KETTER

Solicitors for Intervener. [37]

[Title of District Court and Cause.]

MOTION AND PETITION FOR LEAVE TO
INTERVENE

Comes now, Raymond J. MacDonald, as Trustee of an Express Trust for others, hereinafter sometimes referred to as the "Petitioner", and moves and petitions the above entitled Court for leave and permission to intervene in the above entitled action upon the following grounds:

I.

That jurisdiction is vested in this Court under Revised Statutes, Sections 563 and 629, and amendments thereto, now being Section 41, Title 28, United States Code Annotated.

II.

Petitioner's claim, as hereinafter stated, is in agreement with Plaintiff's claim and contention to the extent that Plaintiff prays that a permanent injunction be issued restraining and enjoining the Great Northern Railway Company from in any way using the right of way which was granted to it by the Act of March 3rd, 1875, for the purpose of drilling for and removing oil, gas and minerals underlying this right of way, and [38] that a permanent injunction issue restraining the Defendant, the Great Northern Railway Company, from drilling for or removing any oil, gas or minerals beneath the surface of its right of way crossing any part of the SW $\frac{1}{4}$ of Section 17, Township 33 North, Range 5 West, Glacier County, Montana, which is a part of the land described in Plaintiff's Complaint in the above entitled action, but Petitioner's claim is adverse to Plaintiff's contention and claim as to the present ownership of the minerals located underneath the right of way of the Defendant, Great Northern Railway Company, where that right of way crosses the NE $\frac{1}{4}$ of the said SW $\frac{1}{4}$ of said Section 17, Township 33 North, Range 5 West, M.M., Glacier County, Montana. Petitioner's claim is adverse to the claim of the Defendant, Great Northern Railway Company, in that said Defendant and Petitioner each claim title to the oil, gas and minerals underneath the said right of way of the Defendant across the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 17.

III.

That by a declaration of trust in writing, dated September 18th, 1934, and executed by him, the above named intervener stated and declared that he holds the SW $\frac{1}{4}$ of Section 17, Township 33 North, Range 5 West, M.M., Glacier County, Montana, together with 6 $\frac{1}{4}$ % landowners' royalty of all the oil, gas and other minerals beneath the surface of said premises, in trust for various and numerous named persons and corporations therein, and that all moneys received by him as royalty payments, or otherwise, for and on account of said lands and royalty interest so held by him in trust, are to be paid to the various and numerous persons mentioned therein as beneficiaries of said trust, after the deduction of reasonable and necessary expenses of the administration of said trust. That said declaration of [39] trust has not been cancelled or terminated, and it is still in full force and effect, and the said intervener, as such trustee, at all times since the date of said declaration of trust, has held, and does yet hold, the aforesaid land, and the said royalty interest, as such trustee.

IV.

That on or about July 11th, 1910, one Lemuel J. Hawkins made a homestead entry under the Act of May 20th, 1862, of the Congress of the United States, and Amendments thereto, on the whole of the SW $\frac{1}{4}$ of Section 17, Township 33 North, Range 5 West, M.M., now in Glacier County, Montana,

and that thereafter a patent to the whole of said SW $\frac{1}{4}$ of said Section 17 was duly issued and delivered by the United States of America to the said Lemuel J. Hawkins, which patent is dated January 23rd, 1914. That intervener is the successor in interest of the said Lemuel J. Hawkins, the patentee to said SW $\frac{1}{4}$ of said Section 17, except to a 6 $\frac{1}{4}$ % royalty of the oil, gas and other minerals beneath the surface of said described premises.

V.

That by virtue of said patent, the whole of the 160 acres within the exterior boundary lines of the said SW $\frac{1}{4}$ of said Section 17 was granted to the said patentee, Lemuel J. Hawkins, subject to the right of way of the Defendant, Great Northern Railway Company, over the said NE $\frac{1}{4}$ of said SW $\frac{1}{4}$ of said Section 17. That said patent did not contain any exception or reservation of the oil, gas or other minerals in or under the said SW $\frac{1}{4}$ of said Section 17, or any part thereof.

VI.

The Plaintiff and Defendant each claim title to the minerals underlying the right of way of the Defendant over the [40] NE $\frac{1}{4}$ of the said SW $\frac{1}{4}$ of said Section 17, which right of way was granted by the Act of March 3rd, 1875, as alleged in the Complaint. Intervener alleges that neither Plaintiff nor the Defendant is or can be the owner of such oil, gas and other minerals underlying the

right of way of the Defendant over the NE $\frac{1}{4}$ of the said SW $\frac{1}{4}$ of said Section 17, and that such oil, gas and other minerals are owned by the Intervener herein as the successor in interest of Lemuel J. Hawkins, the patentee of said SW $\frac{1}{4}$ of said Section 17.

VII.

The interest of this Intervener will not be fully and adequately presented to the above entitled Court in the above entitled cause by the Plaintiff and the Defendant therein, and this intervener is so situated as to be adversely affected by a decision of the above entitled cause, if such a decision were arrived at without the Complete and adequate presentation of the interests of this intervener and without the consideration by the Court of those interests.

VIII.

The claim of the intervener involves questions of law which are the same as the questions of law involved in the above entitled cause between the Plaintiff and Defendant therein, and the intervener's claim and the above entitled action between the Plaintiff and the Defendant have questions of law in common. The Intervener is entitled to intervene under the provisions of Rule 24, subsections a and b, of the Rules of Civil Practice for the District Courts of the United States.

IX.

The question of law involved in the above entitled action is whether, under the Railroad Land

Grant Right of Way Act of [41] of March 3rd, 1875, and acts supplemental thereto and amendatory thereof, title to the minerals underlying right of way so granted are vested:

1st. In the United States, the Plaintiff herein, or

2nd. In the Defendant herein, the Great Northern Railway Company, or

3rd. In this Petitioner, as the successor in interest of a patentee of a subdivision over which the right of way passes.

These questions ought not to be determined by a consideration only of the asserted rights of the Plaintiff and Defendant herein, but should be determined after a consideration of the rights of this intervener and other patentees or their successors in interest who have similar rights to those of this Petitioner, and Petitioner believes that the Plaintiff and the Defendant herein have no reason to stress and will not stress the rights of this Petitioner or of parties similarly situated, and that a full and complete judicial and equitable disposition of the pending case cannot be made without consideration by this Court of the rights of this Petitioner and other persons having similar rights to this Petitioner.

X.

The title of the United States to the minerals underlying the right of way of the Great Northern Railway Company, where that right of way crosses

over the said SW $\frac{1}{4}$ of said Section 17, was extinguished by the subsequent Act of the United States in granting, issuing and delivering the patent to Lemuel J. Hawkins, covering the whole of said SW $\frac{1}{4}$ of said Section 17, as hereinbefore set forth.

XI.

That denial of intervention would constitute denial [42] of relief to which this Petitioner is entitled, in that this Petitioner's rights might be lost or substantially affected, if intervention is not allowed by this Court and if the rights of this Petitioner and of other parties having similar rights are not fully and completely presented to the Court in the above entitled cause.

XII.

Petitioner avers that his interest in the litigation is substantial and that his attempted intervention is made in good faith and in subordination to and in recognition of the main proceeding and expressly recognizes the jurisdiction of this Court therein, and alleges further that no remedy other than the intervention proposed herein is available for protection of intervener's rights to minerals underlying said railway right of way for the reason that the Plaintiff claims said minerals, and your Petitioner is without statutory authority to litigate or quiet his title against Plaintiff in an independent suit brought for that purpose.

XIII.

Petitioner avers that intervention will not unduly delay or prejudice the adjudication of the rights of the original parties hereto.

XIV.

Petitioner avers that, in the interest of justice and equity and to secure a complete adjudication of the title to minerals underlying its grant under the Act of March 3rd, 1875, Defendant, the Great Northern Railway Company, interposes no objection to the granting by this Court of Petitioner's Intervention. [43]

Wherefore, Petitioner prays that this Motion and Petition for Leave and Permission to Intervene in the above entitled action be granted and that this Petitioner's Complaint in Intervention, which is attached hereto, and Intervener's Answer to Plaintiff's Complaint, which is attached hereto, each be ordered filed in the above entitled cause, and that the Defendant, Great Northern Railway Company, be required to answer this Petitioner's said Complaint in Intervention.

Respectfully submitted,

W. H. HOOVER

L. V. KETTER

J. E. CORETTE, JR.,

Attorneys for Petitioner. [44]

[Title of District Court and Cause.]

INTERVENER'S COMPLAINT IN
INTERVENTION

Comes now the above named Intervener and, by leave of court first had and obtained, for his cause of action against the above named defendant, complains and says:

I.

That the grounds upon which the jurisdiction of this court depends are:

(1) That the court already has jurisdiction, the action in which this intervention is made, having been brought by the United States of America.

(2) That the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3000.00, and arises under the laws of the United States and between citizens of different states.

II.

That by a declaration of trust in writing dated September 18, 1934, and executed by him, the above named Intervenor stated and declared that he holds the SW $\frac{1}{4}$ of Section 17, Township 33 North, Range 5 West, M.M., Glacier County, Montana, together with 6 $\frac{1}{4}$ % landowners royalty of all the oil, gas, and other [45] minerals beneath the surface of said premises, in trust for various and numerous named persons and corporations therein, and that all monies received by him as royalty payments, or otherwise, for and on account of said lands and roy-

alty interest so held by him in trust, are to be paid to the various and numerous persons mentioned therein as beneficiaries of said trust, after the deduction of reasonable and necessary expenses of the administration of said trust. That said declaration of trust has not been cancelled or terminated, and it is still in full force and effect, and the said intervener, as such trustee, at all times since the date of said declaration of trust, has held, and does yet hold, the aforesaid land, and the said royalty interest, as such trustee.

III.

That this intervener is a citizen of the State of Montana.

IV.

That the above named defendant is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, with its principal office and place of business at St. Paul, Minnesota.

V.

That under and pursuant to the provisions of the act of March 3, 1875 of the Congress of the United States (18 Revised Stats. 482; Title 43, Sections 934-939, both inclusive, of the United States Code Annotated), the St. Paul, Minneapolis, and Manitoba Railway Company, a railroad corporation, predecessor in interest of the above named defendant, Great Northern Railway Company, having theretofore filed with the Secretary of the Interior

a copy of its Articles of Incorporation, and due proofs of its organization under the same, did on or about the 23rd day of January, 1891, file with the Register of the Land Office at Helena, Montana, in the District where the land was located, a [46] profile of a certain section of twenty miles of its railroad as it was therefore located across public lands in said district.

VI.

That said railroad as so located and indicated on said profile crossed the Northeast Quarter of the Southwest Quarter ($NE\frac{1}{4}$ $SW\frac{1}{4}$) of Section 17, Township 33 North, Range 5 West, M.M., now in Glacier County, Montana, and other public lands.

VII.

That the construction of said section of railroad was completed, and the same is now a part of the main line of railroad maintained and operated by the above named defendant from St. Paul, Minnesota, to the Pacific Coast.

VIII.

That by virtue of the aforesaid act of Congress and compliance therewith by the said predecessor of the above named defendant, a right of way 100 feet wide on each side of the central line of said railroad as it passed over the public lands hereinbefore described, was granted to said railway company, and the above described lands were by said

act required to be thereafter disposed of subject to such right of way.

IX.

That thereafter, to-wit: On or about the 11th day of October, 1907, the said predecessor in interest of the above named defendant, transferred and conveyed to the said defendant all its property, including the said right of way over the lands hereinabove described, and the said defendant, ever since said date, has maintained and operated its main line of railroad upon its said right of way as it passes over the above described land.

X.

That after the filing of said profile, and after the construction of said section of railroad, to-wit, on or about July 11, 1910, one Lemuel J. Hawkins made homestead entry under the act [47] of May 20, 1862 of the Congress of the United States, and amendments thereof, on the whole of the SW $\frac{1}{4}$ of Section 17, Township 33 North, Range 5 West, M.M., now in Glacier County, Montana, which included the Northeast Quarter (NE $\frac{1}{4}$) of said quarter section over which the said right of way of the defendant passes.

XI.

That thereafter, a patent to the whole of the said SW $\frac{1}{4}$ of said Section 17, Township 33 North, Range 5 West, M.M., was duly issued and delivered by the United States of America to the said entry-

man, which patent is dated January 23, 1914, and a copy of which is hereto attached and marked Exhibit "A", to which reference is hereby made.

XII.

That by virtue of said patent, the whole of the 160 acres within the exterior boundary lines of the aforesaid quarter section, was granted to the patentee subject to said right of way over the said Northeast Quarter ($NE\frac{1}{4}$) of said quarter section of said patented land.

XIII.

That said patent did not contain any exception or reservation of the oil, gas, or other minerals in or under the patented lands, or any part thereof, and all the oil, gas, and other minerals therein and thereunder were, by said patent, granted by the United States of America to the said patentee, as a part of said lands, and the said patentee thereby became the owner of, and entitled to the possession of, said oil, gas and other minerals.

XIV.

That thereafter, and while he was still the owner of the aforesaid lands and the oil, gas, and other minerals therein contained, the said patentee died, and such proceedings were had in the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Glacier, in the matter of the [48] estate of Lemuel J. Hawkins, de-

ceased, then and therein said court pending, that a Decree of Distribution was duly and regularly made by said court in said matter on the 26th day of January, 1931, by which the above described quarter section of land was distributed to Clissie A. Hawkins, widow of the said Lemuel J. Hawkins, deceased. That a certified copy of said Decree of Distribution was duly recorded in the office of the County Clerk and Recorder of Glacier County, Montana, in Book #1 of Orders and Decrees at page 85.

XV.

That thereafter, and while she was still the owner of said quarter section of land, the said Clissie A. Hawkins made, executed and delivered to Louis B. O'Neill an oil and gas lease covering the whole of said quarter section, and which, by mesne assignments, has been transferred and is now owned and held by Glacier Production Company, a corporation. That said oil and gas lease is dated October 15, 1931 and was recorded in the office of the County Clerk and Recorder of Glacier County, Montana, on June 9, 1932, in Book 3 of Oil and Gas Leases at page 559.

XVI.

That under and by virtue of the terms of said oil and gas lease, the said land was leased for oil and gas mining purposes, for a period of ten (10) years from its date and so long thereafter as oil or gas is produced from the land by the lessee or his

assigns, and the lessor reserved a royalty of $\frac{1}{8}$ th of the oil produced and saved from said land, and a royalty of the market price at the well of $\frac{1}{8}$ th the gas produced and sold or used off said land or in the manufacture of gasoline.

XVII.

That the said oil and gas lease is still in force and effect. [49]

XVIII.

That thereafter, by a deed dated May 31st, 1934, and recorded June 4, 1934, in Book 10 of Deeds at page 267 in the office of the County Clerk and Recorder of Glacier County, Montana, the said Clissie A. Hawkins, who was still then and there the owner of said quarter section of land, subject to said oil and gas lease, conveyed the same and the whole thereof, to Raymond J. MacDonald, Trustee, and intervener herein, subject to said oil and gas lease, but excepting and reserving $6\frac{1}{4}\%$ royalty of the oil, gas and all minerals beneath the surface of said described premises.

XIX.

That the intervener now, and at all times since the said conveyance to him, owns the said land, as trustee under the declaration of trust aforesaid, and all the oil, gas, and other minerals therein, except $6\frac{1}{4}\%$ royalty, as reserved in said deed by the grantor therein.

XX.

That the above named defendant has no right, title, or interest to or in the oil, gas, and other minerals under or beneath the surface of the part of the said NE $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 17, Township 33 North, Range 5 West, M.M., Glacier County, Montana, that is within the 200 foot limits of said right of way.

XXI.

That the sum or value of the last mentioned oil, gas, or other minerals exceeds the sum of \$3000.00.

XXII.

That the oil and gas, and other minerals, or either of them, beneath the surface of the land within said right of way limits are not a part of defendant's said right of way, and that the same can be withdrawn or extracted therefrom by wells drilled [50] on intervener's said quarter section, but off of said right of way, without injury to said right of way, and without interfering with the use thereof by the defendant for a railroad right of way.

XXIII.

That the defendant, Great Northern Railway Company, claims to be the owner of the oil and gas under or beneath the surface of the part of the said NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 17, Township 33 North, Range 5 West, M.M., that is within the 200 foot limits of said right of way, and threatens to and will, unless restrained by this court, drill wells

thereon and take, extract, remove and appropriate the same to its own use, and threatens so to do, and will deprive this intervener of the same and the royalties to which he is entitled under the oil and gas lease aforesaid, and of his reversionary right in and to said oil and gas, if such lease should become forfeited or cancelled, all to his irreparable damage and injury.

XXIV.

That the intervener has no plain, speedy, or adequate remedy in the ordinary course of the law.

Wherefore, intervener prays that the defendant, Great Northern Railway Company, be required to answer this complaint in intervention; that a permanent injunction be issued, restraining and enjoining it from, in any manner, drilling for oil, gas, or other minerals on its right of way as it crosses the lands hereinbefore described, and from extracting, removing, and appropriating to its own use the said oil, gas, and other minerals; and that the intervener have and recover of the said defendant its costs and disbursements herein incurred.

W. H. HOOVER

L. V. KETTER

J. E. CORETTE, JR.,

Attorneys for Intervener. [51]

“EXHIBIT A”

3547

Transcribed from Teton County Records. Patent Record 6-G, page 124 Compared.

Great Falls 013718

The United States of America

To All to Whom These Presents Shall Come,
Greetings:

Whereas, a Certificate of the Register of the Land Office at Great Falls, Montana, has been deposited in the General Land Office, whereby it appears that, pursuant to the Act of Congress of May 20, 1862, “To Secure Homesteads to Actual Settler on the Public Domain” and the acts supplemental thereto, the claim of Lemuel J. Hawkins has been established and duly consummated, in conformity to law, for the southwest quarter of Section seventeen in Township thirty-three north of Range five west of the Montana Meridian, Montana, containing one hundred sixty acres, according to the Official Plat of the Survey of the said Land, returned to the General Land Office by the Surveyor-General:

Now know ye, that there is, therefore, granted by the United States unto the said claimant the tract of land above described; To have and to hold the said tract of land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to

ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

In Testimony Whereof, I, Woodrow Wilson, President of the United States of America, have caused these Letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed. Given under my hand, at the City of Washington, the Twenty-Third day of January in the year of our Lord one thousand nine hundred and Fourteen and of the Independence of the United States the one hundred and Thirty-Eighth.

By the President

WOODROW WILSON.

By M. P. LeROY,

Secretary. [52]

(General Land Office Seal)

L. Q. C. LAMAR

Recorder of the General Land Office

Recorded: Patent Number 379868

Filed for record Feb. 1 A.D. 1918 at 9 o'clock
A.M. (No. 69161)

E. C. GARRETT,

County Recorder

McS.

By

Deputy

State of Montana

County of Glacier—ss.

I, J. Lee Anderson, County Clerk and Ex-Officio Recorder in and for said County of Glacier, State of Montana, do hereby certify that the above and foregoing is a full, true and correct copy and the whole thereof, of an original Patent filed in my office on the 1st day of February A.D. 1918 at 9:00 o'clock A.M., and now remaining therein as Document No. 69161.

In witness whereof, I have hereunto set my hand and affixed my Official Seal at Cut Bank, Montana, this 3rd day of June A. D. 1939.

[Seal] J. LEE ANDERSON

County Recorder

By FLORENCE WALFORD

Deputy [53]

[Title of District Court and Cause.]

INTERVENER'S ANSWER TO PLAINTIFF'S
COMPLAINT

Comes now the above named Intervener and, by leave of Court first had and obtained, for his answer to the Complaint of the above named Plaintiff in the above entitled action, answers and says:

I.

That by a Declaration of Trust, in writing, dated September 18th, 1934, and executed by him, the

above named Intervener stated and declared that he holds the SW $\frac{1}{4}$ of Section 17, Township 33 North, Range 5 West, M. M., Glacier County, Montana, together with 6 $\frac{1}{4}$ % landowner's royalty of all the oil, gas and other minerals beneath the surface of said premises, in trust for various and numerous named persons and corporations therein, and that all moneys received by him as royalty payments, or otherwise, for and an account of said lands and royalty interest so held by him in trust, are to be paid to the various and numerous persons mentioned therein as beneficiaries of said trust, after the dedeuction of reasonable and necessary expenses of the administration of said Trust. That said Declaration of Trust has not [54] been cancelled or terminated, and it is still in full force and effect, and the said Intervener, as such Trustee, at all times since the date of said Declaration of Trust has held, and does yet hold, the aforesaid land, and the said royalty interest, as such Trustee.

II.

That the NE $\frac{1}{4}$ of said SW $\frac{1}{4}$ of Section 17, Township 33 North, Range 5 West, M. M., Glacier County, Montana, is a part of the lands over which it is alleged in Plaintiff's Complaint that the right of way of the Defendant, Great Northern Railway Company, passes and which it is alleged therein was granted to its predecessor in interest under the Act of Congress of March 3rd, 1875, (18 Revised Stats. 482; Title 43, Sections 934-939, both inclusive, of the U.S.C.A.).

III.

That the Intervener admits the allegations of paragraphs I, II, III, IV, V, VI, VIII, and IX of said Complaint.

IV.

Answering Paragraph VII of said Complaint, the Intervener denies that the oil underlying the surface of the right of way as it crosses the above described lands owned by this Intervener, is the property of the Plaintiff, that it has any right thereto, or will suffer irreparable injury if the Defendant railroad company is not restrained or enjoined from drilling for and removing the oil underlying the surface of said right of way as it crosses the property of the Intervener above described.

Further answering said complaint, and as an affirmative and separate defense thereto, the Intervener alleges:

I.

That by a Declaration of Trust, in writing, dated September 18th, 1934, and executed by him, the above named Intervener stated and declared that he holds the said Southwest [55] Quarter (SW $\frac{1}{4}$) of Section 17, Township 33 North, Range 5 West, M.M., Glacier County, Montana, together with 6 $\frac{1}{4}$ % landowner's royalty of all the oil, gas, and other minerals beneath the surface of said premises, in trust for various and numerous persons and corporations named therein, and that all moneys re-

ceived by him as royalty payments or otherwise for and on account of said lands and royalty interest so held by him in trust are to be paid to the various and numerous persons named therein, as beneficiaries of said Trust, after the deduction of reasonable and necessary expenses of the administration of said Trust. That said Declaration of Trust has not been cancelled or terminated, is still in full force and effect, and the said Intervener, as such Trustee, has at all times since the date of said Declaration of Trust held, and does yet hold, the aforesaid land, and the said royalty interest, as such Trustee, and as such is the owner thereof.

2.

That under and pursuant to the provisions of the Act of March 3rd, 1875 of the Congress of the United States (18 Revised Stats. 482; Title 43, Sections 934-939, both inclusive, of the United States Code Annotated), the St. Paul, Minneapolis, and Manitoba Railway Company, a railroad corporation, predecessor in interest of the above named Defendant, Great Northern Railway Company, having theretofore filed with the Secretary of the Interior a copy of its Articles of Incorporation, and due proofs of its organization under the same, did on or about the 23rd day of January, 1891, file with the Register of the Land Office at Helena, Montana, in the District where the land was located, a profile of a certain section of twenty (20) miles of its railroad

as it was theretofore located across public lands in said district. [55A]

3.

That said railroad, as so located and indicated on said profile, crossed the Northeast Quarter of the Southwest Quarter ($NE\frac{1}{4}SW\frac{1}{4}$) of Section 17, Township 33 North, Range 5 West, M. M., now in Glacier County, Montana, and other public lands.

4.

That the construction of said section of railroad was completed, and the same is now a part of the main line of railroad maintained and operated by the above named defendant from St. Paul, Minnesota, to the Pacific Coast.

5.

That by virtue of the aforesaid Act of Congress and compliance therewith by the said predecessor of the above named Defendant, a right of way 100 feet wide on each side of the central line of said railroad as it passes over the public lands hereinbefore described, was granted to said Railway Company, and the above described lands were by said Act required to be thereafter disposed of, subject to such right of way.

6.

That thereafter, to-wit: on or about the 11th day of October, 1907, the said predecessor in interest of

the above named Defendant, transferred and conveyed to the said Defendant all its property, including the said right of way over the lands hereinabove described, and the said Defendant, ever since said date, has maintained and operated its main line of railroad upon its said right of way as it passes over the above described land.

7.

That after the filing of said profile, and after the construction of said section of railroad, to-wit: on or about July 11th, 1910, one Lemuel J. Hawkins made homestead entry under the Act of May 20th, 1862, of the Congress of the [56] United States, and amendments thereto, on the whole of the SW $\frac{1}{4}$ of Section 17, Township 33 North, Range 5 West, M. M., now in Glacier County, Montana, which included the Northeast Quarter (NE $\frac{1}{4}$) of said quarter section over which the said right of way of the Defendant passes.

8.

That thereafter, a patent to the whole of the said SW $\frac{1}{4}$ of said Section 17, Township 33 North, Range 5 West, M. M., was duly issued and delivered by the United States of America to the said entryman, which patent is dated January 23rd, 1914, and a copy of which is hereto attached and marked Exhibit "A," to which reference is hereby made.

9.

That by virtue of said patent, the whole of the 160 acres within the exterior boundary lines of the

aforesaid quarter section was granted to the patentee subject to said right of way over the said Northeast Quarter (NE $\frac{1}{4}$) of said quarter section of said patented land.

10.

That said patent did not contain any exception or reservation of the oil, gas, or other minerals in or under the patented lands, or any part thereof, and all the oil, gas and other minerals therein and thereunder were by said patent granted by the United States of America to the said patentee, as a part of said lands, and the said patentee thereby became the owner and entitled to the possession of said oil, gas and other minerals, and the Plaintiff, since the issuance of said patent, has not had, nor has it now, any right, title or interest therein.

11.

That thereafter, and while he was still the owner of the aforesaid lands and the oil, gas and other minerals there- [57] in contained, the said patentee died, and such proceedings were had in the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Glacier, in the matter of the Estate of Lemuel J. Hawkins, Deceased, then and there in said Court pending, that a Decree of Distribution was duly and regularly made by said Court in said matter on the 26th day of January, 1931, by which the above described quarter section of land was distributed to Clissie

A. Hawkins, widow of the said Lemuel J. Hawkins, Deceased. That a certified copy of said Decree of Distribution was duly recorded in the Office of the County Clerk and Recorder of Glacier County, Montana, in Book 1 of Orders and Decrees, at page 85.

12.

That thereafter, and while she was still the owner of said quarter section of land, the said Clissie A. Hawkins made, executed and delivered to Louis B. O'Neill an Oil & Gas Lease covering the whole of said quarter section, and which, by mesne assignments, has been transferred and is now owned and held by Glacier Production Company, a corporation. That said Oil & Gas Lease is dated October 15th, 1931, and was recorded in the Office of the County Clerk & Recorder of Glacier County, Montana, on June 9th, 1932, in Book 3 of Oil & Gas Leases, at page 559.

13.

That under and by virtue of the terms of said Oil & Gas Lease, the said land was leased for oil and gas mining purposes for a period of ten (10) years from its date and so long thereafter as oil, or gas is produced from the land by the Lessee or his assigns, and the Lessor reserved a royalty of one-eighth of the oil produced and saved from said land, and a royalty of the market price at the well of one-eighth of the gas produced and sold or used off said land or in the manufacture of gasoline. [58]

14.

That the said Oil & Gas Lease is still in force and effect.

15.

That thereafter, by a Deed dated May 31st, 1934, and recorded June 4th, 1934, in Book 10 of Deeds, at page 267, in the Office of the County Clerk & Recorder of Glacier County, Montana, the said Clissie A. Hawkins, who was still then and there the owner of said quarter section of land, subject to said oil and gas lease, conveyed the same and the whole thereof, to Raymond J. MacDonald, Trustee, and intervener herein, subject to said Oil & Gas Lease, but excepting and reserving $6\frac{1}{4}\%$ royalty of the oil, gas and other minerals beneath the surface of said described premises.

16.

That the said intervener now, and at all times since the said conveyance to him, owns the said land, as Trustee under the Declaration of Trust aforesaid, and all the oil, gas and other minerals therein, except $6\frac{1}{4}\%$ royalty, as reserved in said Deed by the Grantor therein.

17.

That neither the above named Plaintiff nor the above named Defendant has any right, title, or interest to or in the oil, gas and other minerals in, under, or beneath the surface of the part of the said $NE\frac{1}{4}SW\frac{1}{4}$ of said Section 17, Township 33

North, Range 5 West, M. M., Glacier County, Montana, that is within the said right of way limits.

18.

That the oil and gas, and other minerals, or either of them, beneath the surface of the land within said right of way limits are not a part of Defendant's said right of way, and that [59] the same can be withdrawn or extracted therefrom by wells drilled on Intervener's said quarter section, but off of said right of way, without injury to said right of way, and without interfering with the use thereof by the Defendant for a railroad right of way.

Wherefore, having fully answered the Plaintiff's Complaint, the Intervener prays that the Plaintiff take nothing by his said action insofar as the claim to relief is based upon Plaintiff's claim of ownership of the oil, gas and other minerals beneath the surface of the right of way.

W. H. HOOVER

L. V. KETTER

J. E. CORETTE, JR.

Attorneys for Intervener

[Endorsed]: Filed June 22, 1939. [60]

Thereafter, on July 17, 1939, Notice of Appeal was duly filed herein, in the words and figures following, towit: [61]

In the District Court of the United States in and
for the District of Montana, Great Falls Di-
vision

No. 32 Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Defendant.

STAR POINTER EXPLORATION COMPANY,
Intervenor,

RAYMOND MacDONALD, As Trustee of an Ex-
press Trust for Others,

Intervenor.

NOTICE OF APPEAL.

To the above named Plaintiff and to John B. Tansil,
Esq., and Aubrey Lawrence, Esq., Its Attorneys,
and to the above named Defendant, and to F.
G. Dorety and Weir, Clift & Bennett, Its At-
torneys, and to Raymond J. MacDonald, As
Trustee of an Express Trust for Others, Inter-
venor, and his Attorneys, W. H. Hoover, Esq.,
L. V. Ketter, Esq., and J. E. Corrette, Jr., Esq.,
and to all persons interested in the above en-
titled *cuase*:

You, and each of you, will please take notice, and notice is hereby given that Star Pointer Exploration Company, above named as intervenor, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order made and entered in the above cause on the 22nd day of June, 1939, the Hon. Charles H. Pray presiding, and in which Star Pointer Exploration Company was refused and denied the right to intervene in said action, and [62] Star Pointer Exploration Company herein appeals from the judgment dismissing it from said action. Said judgment being entered in this action on June 22nd, 1939, and denying to Star Pointer Exploration Company the right to intervene in said action.

Dated this 14th day of July, 1939.

EDWARD J. BLOOM

1406 Hobart Building,
San Francisco, California.

S. P. WILSON

Deer Lodge, Montana
Attorneys for Appellant,
Star Pointer Exploration
Company.

[Endorsed]: Filed July 17, 1939. [63]

Thereafter, on July 17, 1939, Bond on Appeal was duly filed herein, in the words and figures following, towit: [64]

In the District Court of the United States in and
for the District of Montana, Great Falls Di-
vision

No. 32 Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation,

Defendant.

STAR POINTER EXPLORATION COMPANY,
Intervenor,

RAYMOND MacDONALD, As Trustee of an Ex-
press Trust for Others,

Intervenor.

BOND ON APPEAL.

Whereas, Star Pointer Exploration Company, a Corporation, designated as Intervenor, is about to appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit, from an order rendered against it in said action, and a judgment in said action refusing and denying said Star Pointer Exploration Company the right to intervene in said action, which said order and judgment was made and rendered upon the 22nd day of June, 1939.

Now, therefore, in consideration of the premises and of such appeal, Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and authorized to do business in the State of Montana, does hereby undertake and promise on the part of the appellant that said appellant will pay the costs which may be awarded against [65] it on the appeal, if the appeal is dismissed or the judgment affirmed and such costs as the appellant court may award if the judgment is modified, not exceeding \$250.00, in which amount said Fidelity and Deposit Company of Maryland does hereby acknowledge itself to be bound.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,

[Corporate Seal) By A. A. MALCOLM

Agent.

By S. P. WILSON

Attorney-in-Fact.

[Endorsed]: Filed July 17, 1939. [66]

Thereafter, on August 1, 1939, settlement of Proposed Bill of Exceptions of Star Pointer Exploration Company, came on for hearing, the minute entry thereof being as follows, to-wit: [67]

[Title of Cause.]

This cause was duly called for hearing this day on the Proposed Bill of Exceptions of Star Pointer

Exploration Company, Mr. John B. Tansil, United States District Attorney, appearing for the Plaintiff, and Mr. S. P. Wilson appearing for Star Pointer Exploration Company.

Thereupon by agreement of counsel court ordered that the proposed bill of exceptions be amended to include the plaintiff's complaint, and the answer of the defendant Great Northern Railway Company herein, by reference, and insertion in the copy of said bill of exceptions, to be included in the transcript on appeal herein, of said pleadings.

Thereupon the Bill of Exceptions as amended was signed, settled and allowed by the court and ordered filed.

Entered in open court at Great Falls, Montana, August 1, 1939.

C. R. GARLOW,
Clerk. [68]

Thereafter, on August 1, 1939, Bill of Exceptions of Star Pointer Exploration Company, as settled and allowed by the court was duly filed herein, in the words and figures as follows, to-wit: [69]

[Title of District Court and Cause.]

DRAFT OF PROPOSED BILL OF EXCEPTIONS OF STAR POINTER EXPLORATION COMPANY TO THE RULING, DECISION AND ORDER OF THE COURT DENYING STAR POINTER EXPLORATION COMPANY PERMISSION TO INTERVENE.

Be it remembered: Plaintiff's complaint in this cause was filed upon March 23, 1939, and is in words and figures as follows:

[Note: The complaint here referred to is set out at page 2 of this printed record and is here omitted to avoid duplication.] [70]

Thereafter upon April 18, 1939, Defendant filed its Answer which Answer is in words and figures as follows:

[Note: The answer here referred to is set out at page 7 of this printed record and is here omitted to avoid duplication.] [73]

That after the filing of plaintiff's complaint in this action and the answer of defendant, Great

Northern Railway Company, a corporation, Star Pointer Exploration Company did serve upon the defendant in said action and upon the plaintiff in said action its motion and petition for leave to intervene in said action together with notice of its motion for leave to intervene said motion and petition for leave to intervene being in words and figures as follows:

[Note: Motion and petition to intervene, here referred to is set out at page 13 of this printed record and is here omitted to avoid duplication.] [76]

Star Pointer Exploration Company did give notice to the Plaintiff in said action and defendant in said action that said application and petition to intervene would be presented to the above court, said notice being in words and figures as follows:

[Note: Notice of motion for leave to intervene here referred to is set out at page 12 of this printed record and is here omitted to avoid duplication.] [82]

At the same time Star Pointer Exploration Company did serve upon the plaintiff and upon the defendant its complaint in intervention, Pro Interesse Suo, the same being in words and figures as follows:

[Note: Complaint in intervention, Pro Interesse Suo here referred to is set out at page 22 of this

printed record and is here omitted to avoid duplication.] [83]

Thereafter, to-wit, June 22, 1939, at the court room, Billings Division, Billings, Montana, said petition and motion of Star Pointer Exploration Company to intervene in said action came on regularly for hearing at the opening of court before the Hon. Charles N. Pray, Judge, John B. Tansil, Esq., and ————— Lawrence, Esq., appearing as counsel for Plaintiff, F. G. Dorety appearing as counsel for Defendant, L. V. Ketter, Esq. and J. E. Corette, Jr. appearing as counsel for Raymond J. MacDonald, as Trustee of an Express Trust for Others, as intervenor and S. P. Wilson, Esq. and Edward J. Bloom, Esq. appearing as counsel for petitioners, Star Pointer Exploration Company. The objection of plaintiff to the application of Star Pointer Exploration Company to intervene was served upon counsel for Star Pointer Exploration Company and filed, the same being in words and figures as follows: [86]

[Title of District Court and Cause.]

ANSWER

Comes now the plaintiff, the United States of America, and for answer to the Motion and Petition for Leave to Intervene of the Star Pointer Exploration Company, a Corporation, objects to the said Motion and Petition for Leave to Intervene and to the jurisdiction of the Court to hear and

determine the same or to grant the said Motion upon the following grounds and for the following reasons:

I

That the intervenor is not a party permitted under Rule 24 of the Rules of Civil Procedure to intervene, either as of right or by permission of the Court.

II

That the Petition and Complaint in Intervention fails to state a cause of action.

III

That the intervenor seeks to enlarge the issues of the action as made by the pleadings between the plaintiff and the defendant. [87]

IV

That the intervenor has no interest in the subject matter of the action.

V

That the intervenor seeks to secure a declaratory judgment against the United States and that the Court has no jurisdiction to grant such declaratory judgment.

VI

That if the Complaint or Petition in Intervention is allowed, it will constitute a suit against the United States brought without its consent.

VII

That a judgment in the action will not bind the intervenor and will not prejudice his interests or rights.

VIII

That the Court is without jurisdiction to make the United States a party defendant to a cross bill sought to be filed by the intervenor.

Dated this 21st day of June, 1939.

(Signed) JOHN B. TANSIL.

United States Attorney.

(Signed) ROY F. ALLAN

Assistant U. S. Attorney

(Signed) AUBREY LAWRENCE

Special Assistant to

The Attorney General. [88]

Thereupon the application of Star Pointer Exploration Company to intervene and objections thereto were duly argued to the court by the respective counsels and were submitted to the court for decision and the court did then and there, to-wit, upon June 22, 1939, deny the application and petition of Star Pointer Exploration Company to intervene and did refuse permission to intervene, to which ruling of the court Star Pointer Exploration Company by its counsel then and there excepted and was given an exception.

Thereupon the court made an order giving and granting the Star Pointer Exploration Company thirty days from and after June 22, 1939, in which time to serve and file herein a draft of its proposed bill of exceptions to the ruling and decision and order of the court.

And now within the time allowed by law, Star Pointer Exploration Company files its draft of proposed bill of exceptions and asks that the same be settled and allowed and filed in the above court in the above cause.

EDWARD J. BLOOM and
S. P. WILSON

Attorneys for Star Pointer
Exploration Company

I, Charles N. Pray, Judge, do hereby certify that the foregoing bill of exceptions of Star Pointer Exploration Company is true and correct and the same is now here by me settled and allowed and is ordered filed by the clerk in the above court in the above cause.

Dated this 1st, day of Aug. 1939.

CHARLES N. PRAY
Judge.

[Endorsed]: Lodged in Clerk's Office, July 5, 1939. Filed August 1, 1939. [89]

Thereafter, on August 1, 1939, Order Extending Time to Docket Appeal was duly filed herein, the original order being hereto annexed and being as follows to-wit: [90]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
APPEAL

Upon Motion and Application of S. P. Wilson, one of the attorneys for Star Pointer Exploration Co., and it appearing a proper case for the making of this order:

It is ordered that Star Pointer Exploration Co. be, and it hereby is, given and granted to and including fifty days from the 17th day of July, 1939, in which time to cause its appeal herein to be docketed in the Circuit Court of Appeals for the Ninth Circuit.

Dated the 1st day of August, 1939.

CHARLES N. PRAY

Judge

[Endorsed]: Filed August 1, 1939. [91]

Thereafter, on August 1, 1939, Praecipe for Transcript on Appeal was duly filed herein, being in the words and figures following, towit: [93]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the above entitled Court:

You will please prepare a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal taken in the above entitled cause and incorporate in such transcript of record the following papers, to-wit:

1. Complaint.
2. Notice of Motion by Star Pointer Exploration Co. for leave to intervene.
3. Motion and Petition of Star Pointer Exploration Co. for leave to intervene.
4. Intervention Pro Intresse Suo.
5. Separate answer of Great Northern Railway Co.
6. Notice of motion of Raymond J. MacDonald as Trustee of an Express Trust for Others, Intervener.
7. Motion and Petition of Raymond J. MacDonald as Trustee of an Express Trust for Others, Intervener, for leave to intervene.
8. Complaint in intervention of Raymond J. MacDonald as Trustee of an Express Trust for Others, Intervener.
9. Bill of exceptions of Star Pointer Exploration Co. settled and approved herein.

10. Order, decision, and judgment of the Court refusing and denying Star Pointer Exploration Company permission to intervene. [94]

11. Notice of appeal of Star Pointer Exploration Co. and Bond on Appeal.

12. This praecipe with proof of service.

Said transcript to be prepared and duly certified by you as required by law and the rules of the above-entitled court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this first day of August, 1939.

S. P. WILSON.

EDWARD J. BLOOM.

Attorneys for Star Pointer
Exploration Company.

Service of foregoing Praecipe and receipt of copy of same acknowledged this 1st day of August, 1939.

JOHN B. TANSIL,

U. S. District Atty. and
Attorney for Plaintiff.

[Endorsed]: Filed August 1, 1939 [95]

Thereafter, on August 7, 1939,

AFFIDAVIT OF MAILING COPY OF
PRAECIPE

for transcript on appeal was duly filed herein, in the words and figures following, towit: [96]

[Title of District Court and Cause.]

State of Montana

County of Powell—ss.

I, Dorothy Brennan, being duly sworn upon my oath say: I am a native born citizen of the United States over the age of eighteen years and I am a clerk and stenographer at the law office of S. P. Wilson at Deer Lodge, Montana. F. E. Dorety is the attorney for defendant, Great Northern Railway Company and he resides at St. Paul, Minnesota, and his post office address is c/o Legal Department, Great Northern Railway Company, St. Paul, Minnesota. J. E. Corette, Jr., is one of the attorneys for Raymond MacDonald, As Trustee of an Express Trust for Others, Intervener, and he resides at Butte, Montana, and his post office address is Electric Building, Butte, Montana.

Upon August 2nd, 1939, I served the designation of the portions of the record, proceedings, to be contained in the record on appeal of Star Pointer Exploration Company upon the attorneys foregoing named by mailing to each of them a true and correct copy of praecipe of Star Pointer Exploration Company to the Clerk of the above court for preparation of a transcript of the record on appeal and designating the portions of the record to be included in the record on appeal; said copies of praecipe were each securely enclosed in a [97] sealed envelope and said envelopes were addressed as follows:

Mr. F. E. Dorety
Legal Department
Great Northern Railway Co.
St. Paul, Minnesota
Mr. J. E. Corette, Jr.
Electric Building
Butte, Montana

and said envelopes each with postage prepaid thereon were by me deposited in the United States Post Office at Deer Lodge, Montana, on the date aforesaid.

DOROTHY BRENNAN

Subscribed and sworn to before me this 5th day of August, 1939.

[Notarial Seal] S. P. WILSON
Notary Public for the State of Montana,
Residing at Deer Lodge, Montana.

My Commission expires December 10, 1939.

[Endorsed]: Filed August 7th, 1939. [98]

CLERK'S *TRANSCRIPT* TO RECORD ON
APPEAL

United States of America:
District of Montana—ss.

I, C. R. Garlow, Clerk of the District Court of the United States for the District of Montana, do hereby certify to the Honorable, The United States

Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 99 pages, numbered consecutively from 1 to 99, inclusive, is a full, true and correct transcript of all matter designated by the parties as the record on appeal in case No. 32, United States vs. Great Northern Ry. Co., et al., as appears from the original records and files of said court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Twenty-Eight and 25/100ths Dollars, (\$28.25), and have been paid by the appellant.

Witness my hand and the seal of said court at Great Falls, Montana, this 22nd day of August, A.D., 1939.

[Seal] C. R. GARLOW,
Clerk as aforesaid.

By MAX JENKS
Deputy. [99]

[Endorsed]: No. 9274. United States Circuit Court of Appeals for the Ninth Circuit. Star Pointer Exploration Company, Appellant, vs. United States of America, Great Northern Railway Company, a Corporation, and Raymond MacDonald, as Trustee of an Express Trust for Others, Appellees. Transcript of Record. Upon Appeal

from the District Court of the United States for the District of Montana.

Filed August 25, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 9274

STAR POINTER EXPLORATION COMPANY

Appellant,

vs.

UNITED STATES OF AMERICA, GREAT NORTHERN RAILWAY COMPANY, a corporation, RAYMOND J. MacDONALD as trustee of an express trust for others,

Respondents.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL AND DESIGNATION OF PARTS OF RECORD NECESSARY FOR CONSIDERATION AND TO BE PRINTED

Comes now the appellant and complying with Subd. 6 of Rule 19 of the Rules of the United States

Circuit Court of Appeals for the Ninth Circuit and makes statement of the points on which appellant intends to rely on the appeal, to-wit:

The question for determination is—in whom is vested title to minerals underlying a railroad right-of-way granted under Act of Congress of July 2, 1864, and/or March 3, 1875, through public lands of the United States and acts supplementary thereto and amendatory thereof. Appellant claims, (a), that appellant is the grantee of the patentees from the United States of America of fractional subdivisions of land traversed by right-of-way granted to Northern Pacific Railway Company under act of July 2, 1864, subject to the rights of the railway company and its successors in the right-of-way strip as the same is conferred and for the purposes granted under the Act of Congress; (b), that as grantee of patentees appellant has an interest in the question to be determined by the present litigation; (c), representation of appellant's interest by existing parties may be inadequate and appellant may be bound by an adverse judgment in the action, so that appellant may be adversely affected by the judgment in the case; (d), appellant's claim and the main action have questions of law as well as questions of fact in common; hence, and in order that appellant's rights may not, in appellant's absence, be adversely determined, the court in the exercise of discretion should have permitted appellant to intervene and participate in the litigation.

Under Subd. (a) of Rule 24 of Rules of Civil Procedure, appellant should be permitted to intervene as a matter of right; under Subd. (b) of the same rule, the Court, in the exercise of the Court's discretion, should have extended to appellant the right to intervene, such intervention not tending to unduly delay nor prejudice the adjudication of the rights of the original parties. By the decision, the Court denied to appellant the right to intervene, which ruling and decision was prejudicial to appellant and erroneous.

Appellant thinks that it is necessary for the consideration of the points on which appellant intends to rely to have printed the entire record as certified by the Clerk of the United States District Court for the District of Montana to the Clerk of the above Court and appellant desires that such entire record be printed in order that the points upon which appellant intends to rely may be given consideration and appellant respectfully requests the printing of such entire record as the Transcript of Record upon Appeal.

Dated this 29th day of August, 1939.

EDWARD J. BLOOM

Wallace, Idaho

S. P. WILSON

Deer Lodge, Montana

Attorneys for Appellant

State of Montana

County of Powell—ss.

I, Dorothy Brennan, being duly sworn upon my oath say: I am a native born citizen of the United States over the age of eighteen years and I am a clerk and stenographer in the law office of S. P. Wilson at Deer Lodge, Montana. Upon August 29, 1939, I served the foregoing Statement of Points on which Appellant Intends to Rely on Appeal and Designation of Parts of Record Necessary for Consideration and to be Printed in the above entitled action upon the following attorneys for respondents above named, to-wit:

John B. Tansil

United States Attorney

Billings, Montana

F. G. Dorety

Law Department

Great Northern Railway Company

St. Paul, Minnesota

W. H. Hoover, L. V. Ketter

and John E. Corrette

Attorneys at Law

Butte, Montana

That such service was made by mailing to each of the attorneys aforesaid a true and correct copy of said Statement of Points on which Appellant Intends to Rely on Appeal and Designation of Parts

of Record Necessary for Consideration and to be Printed. Each copy so mailed was securely enclosed in a sealed envelope and said envelopes were addressed to the attorneys above named at their addresses as above stated, respectively, and each of said envelopes so enclosed and with postage thereon prepaid was by me deposited in the United States Post Office at Deer Lodge, Montana upon the date aforesaid.

DOROTHY BRENNAN

Subscribed and sworn to before me this twenty-ninth day of August, 1939.

[Seal] S. P. WILSON

Notary Public for the State of Montana,
Residing at Deer Lodge, Montana

My Commission expires December 10, 1939.

[Endorsed]: Filed Sept. 1, 1939.

